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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

PLANNED PARENTHOOD ARIZONA, INC., et al.,

Plaintiffs,

v.

MARK BRNOVICH, Attorney General of the State of Arizona, et al.,

Defendants,

and

ERIC HAZELRIGG, M.D., as guardian ad litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated,

Intervenor.

Case No.: C127867

DEFENDANT ATTORNEY GENERAL MARK BRNOVICH'S RESPONSE TO EMERGENCY MOTION FOR STAY OF ORDER PENDING APPEAL

(Assigned to the Hon. Kellie Johnson)

Plaintiff Planned Parenthood of Arizona, Inc. ("PPAZ") requests that the Court enter an open-ended stay of the Court's September 23, 2022 final order granting the Defendant Attorney General and the Intervenor and Guardian ad Litem's motion for relief from judgment ("Under Advisement Ruling"). In that order, the Court *narrowly* held that the Court's "Second Amended Declaratory Judgment and Injunction Pursuant to the Mandate of the Court of Appeals, Division II" ("Second Amended Final Judgment"), which was based exclusively on the U.S. Supreme Court's decision in *Roe v. Wade*, can no longer be applied prospectively following the decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

In resolving the prospective effect of this injunction, the Court provided important and necessary clarity, but it properly did not seek to resolve every potential issue related to § 13-3603 going forward. The Court correctly found that "an attempt to reconcile fifty years of legislative activity [is] procedurally improper in the context of the motion and record before it." [Under Advisement Ruling at 7.] The Court also correctly concluded that "[w]hile there may be legal questions the parties seek to resolve regarding Arizona statutes on abortion, those questions are not for this Court to decide here." [*Id.*]

In other words, the Court did nothing to prevent PPAZ or the County Attorney from separately challenging or seeking declaratory relief with respect to § 13-3603. But PPAZ has not done so, instead opting to again shoehorn unrelated merits and statutory construction issues into the narrow Rule 60 inquiry. And because PPAZ can bring a separate challenge to § 13-3603, the relevant time period for any injury is brief (i.e. the time to bring a new action) and PPAZ cannot show substantial hardship during that brief window. Abortion once completed is irreversible, and the Under Advisement Ruling preserves the status quo without in any way limiting anyone's ability to seek further judicial relief as to the validity or construction of § 13-3603. In sum, PPAZ's motion for stay and Pima County's joinder attempt to morph the narrow Under Advisement Ruling into something it is not, and then attack that straw man. This should be rejected, and PPAZ's requested stay of the important work the ruling actually did—merely clarifying

that an injunction premised solely on *Roe v. Wade* cannot have prosective effected—denied.

In its motion for stay pending appeal, PPAZ does not attempt to establish that its appeal of the narrow Under Advisement Ruling has probable success on the merits or that the possibility of irreparable harm exists. Instead, PPAZ argues only that it is entitled to a stay pending appeal because its appeal presents serious questions and the balance of hardships tips sharply in its favor. The County Attorney has joined in PPAZ's stay arguments, but like PPAZ she advances *no* argument that PPAZ is likely to prevail on appeal of the Under Advisement Ruling. Instead, the County Attorney, like PPAZ, doubles down on the attempt to expand the scope of these proceedings beyond the narrow Rule 60 inquiry, without ever acknowledging the Court's conclusion that PPAZ "may move to amend its Complaint after relief is granted, or may file a new action to seek relief it believes is appropriate." Under Advisement Ruling at 6.PPAZ is not entitled to the stay it requests. On the "serious questions" prong, PPAZ acknowledged from the outset of these proceedings that the Attorney General was entitled to relief from the Second Amended Final Judgment based on the *Dobbs* decision. PPAZ argued, however, that, in the context of a Rule 60 motion, the Court should harmonize Arizona's abortion statutes, which PPAZ incorrectly claimed are in conflict, by leaving the Second Amended Final Judgment in place as to licensed physicians.

The Court's sound refusal to engage in the exercise of reconciling legislation in deciding a motion for relief from prospective application of an existing final injunction does not create serious questions for appeal because PPAZ is unlikely to convince the Court of Appeals that the only actual relief granted here—Rule 60 relief from judgment—was improper. *See Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶13 (App. 2009) ("[W]hether there are "serious questions" depends more on the strength of the legal claim than on the gravity of the issue."). PPAZ cites *Agostini v. Felton*, for the proposition that a motion under Rule 60(b)(5) requires a court to analyze whether there has been a "significant change either in factual conditions or in law." 521 U.S. 203, 215 (1997). The Court applied that standard in determining whether

the Attorney General met his burden to show that relief from the Second Amended Final Judgment was required. [Under Advisement Ruling at 5 (quoting *Agostini*).] And the Court correctly found that *Dobbs* constitutes a significant change in the law underlying the Second Amended Final Judgment (PPAZ has never claimed otherwise).

PPAZ does not cite (and has never cited) a decision holding that a party opposing a Rule 60 motion can do so by asking a court to undergo a survey of existing statutes on a topic to ensure that modifying a judgment would be consistent with those statutes. To the contrary, the U.S. Supreme Court has held that once a party carries the burden of showing a change in law warranting relief, "a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009). The Ninth Circuit recently reiterated that "*Agostini* confirms the equitable principle that when the law changes to permit what was previously forbidden, it is an abuse of discretion not to modify an injunction based on the old law." *California v. EPA*, 978 F.3d 708, 714–15 (9th Cir. 2020). Thus, in the current procedural posture, the Court had a straightforward legal decision—if *Dobbs* constitutes a significant change in the law, the Second Amended Final Judgment must be set aside; if *Dobbs* does not constitute a significant change in the law, the Second Amended Final Judgment could remain. Contrary to PPAZ's characterization of the legal question here as complex, the *legal* question to be asked and the answer to that question are straightforward, and this will remain true on appeal. Because *Dobbs* clearly constitutes a significant change in the law, the Second Amended Final Judgment should no longer be given prospective application.

Even if the Court of Appeals concludes it can engage in the statutory reconciliation that PPAZ insisted this Court should perform in evaluating a Rule 60 motion, that will not make the legal question any more serious because PPAZ is unlikely to prevail on that question as well. *See Ariz. Ass'n of Providers for Persons with Disabilities*, 223 Ariz. at 12 ¶13 ("[W]hether there are "serious questions" depends more on the strength of the legal claim than on the gravity of the issue."). As the Attorney General explained in his reply brief in support of relief from the Second Amended Final

Judgment, PPAZ's argument that A.R.S. § 13-3603 was implicitly repealed fails badly. [Reply In Support Of Attorney General's Motion For Relief From Judgment at 5–10.] To the contrary, even after *Roe*, the Arizona Legislature "re-enact[ed]" the law at issue here anew. *See Summerfield v. Super. Ct.*, 144 Ariz. 467, 476 (1985); *see also* [Under Advisement Ruling at 3]. Moreover, the Legislature repeatedly disclaimed that post-*Roe* legislation was creating a right to abortion. [*See* Reply In Support Of Attorney General's Motion For Relief From Judgment at 6.] PPAZ, contrary to their new position in favor of more-recent abortion legislation, asserted in prior litigation that "[t]hese and other similar laws passed by the Arizona Legislature represent a sustained campaign to deny women their constitutional rights to abortion in the State of Arizona." [*Id.* at 7.] And finally, A.R.S. § 13-3603 can peacefully co-exist alongside the statutes PPAZ relies upon, allowing county prosecutors to exercise primary jurisdiction and discretion in deciding which regulations to enforce when more than one statute is implicated. [*Id.* at 8–9.]

PPAZ claims inconsistencies between the law requiring a 24-hour waiting period with exceptions for medical emergencies and § 13-3603. Those inconsistencies do not in fact exist. The exception contained within § 13-3603 contains no waiting period. Therefore, if "on the basis of the physician's good faith clinical judgment," a "medical emergency" as defined in § 36-2151 exists and the exception to § 13-3603 is met, then the abortion may be performed immediately without waiting 24 hours. If "on the basis of the physician's good faith clinical judgment," a "medical emergency" does not exist but the exception to § 13-3603 does exist, then the abortion may be performed after the 24-hour waiting period.

In asking for a stay, PPAZ relies almost entirely on the new statute, Senate Bill ("S.B.") 1164, which went into effect on September 24, 2022. As PPAZ did in its response to the Attorney General's motion for relief from judgment, it mischaracterizes that law as "allow[ing] abortions to be performed within the 15-week limit set in that law." S.B. 1164 does not "allow" abortions prior to 15 weeks of gestation; the law instead forbids abortions after 15 weeks of gestation. In S.B. 1164, the Legislature expressly stated that "[t]his act does not: 1. Create or recognize a right to abortion or

alter generally accepted medical standards. The Legislature does not intend this act to make lawful an abortion that is currently unlawful." 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2d Reg. Sess.); *see also id.* at § 2 (stating that S.B. 1164 does not "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion"). Once the Court set aside the Second Amended Final Judgment on Friday, September 23, 2022, all abortions made unlawful under A.R.S. § 13-3603 became unlawful again. By its express terms then, S.B. 1164 did not suddenly make those abortions lawful when it went into effect *the next day*.

Both S.B. 1164 and A.R.S. § 13-3603 can (and now do) co-exist, allowing prosecutorial discretion as to which law will be charged when both are violated. *See State v. Lopez*, 174 Ariz. 131, 143 (1992) ("When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply."). Thus, the Governor was correct in stating that S.B. 1164 took effect on September 24 and the Attorney General was correct in stating that S.B. 1164 would take effect approximately 90 days after the issuance of *Dobbs*. And the Attorney General did not "reverse course" from his accurate statement about S.B. 1164 by filing the motion for relief from judgment. PPAZ's reliance on these statements (pulled from social media) (at 3) show just how untenable its legal position is.

Turning to the other factors, PPAZ alleges that it is suffering hardship due to confusion caused by the interaction of Arizona's statutes regulating abortion and social media statements. As already discussed, the statutes PPAZ identifies can coexist and the statements by public officials accurately reflect that S.B. 1164 is now in effect alongside § 13-3603.

The County Attorney joins in this argument, but she curiously does not allege any harms of her own. First, the County Attorney's claimed hardship to county attorneys of confusion is illusory. Joinder at 2-3. As an initial matter, the Pima County Attorney already has definitively stated that she will not prosecute abortion-related crimes. *See* https://theappeal.org/prosecutors-are-the-new-abortion-police/ (June 1, 2022) ("Six of Arizona's nine abortion clinics are in Maricopa County. Two are in Pima County, where

the county attorney, Laura Conover, said earlier this month that her office will 'do everything in our power to ensure that no person seeking or assisting in an abortion will spend a night in jail.'"). She said this *before* the Under Advisement Ruling, and her joinder provides no plausible argument that she has reconsidered that absolute position. As to other County Attorneys, the prior injunction did not on its face apply to them. But even if it somehow applied to them, the injunction does not require any affirmative acts by them. It does not require them to prosecute anyone. The County Attorneys are free to exercise full and independent prosecutorial discretion in deciding how to enforce Arizona's various abortion regulations. And the joinder never explains how setting aside an injunction of one county attorney that was based solely on a Supreme Court decision that has now been expressly overruled, will somehow lessen confusion surrounding Arizona law. Instead, if additional guidance is needed, the way to seek such guidance is through the additional procedures discussed in the Under Advisement Ruling contemplated—filing a new action seeking declaratory relief by any person with standing (e.g., a doctor who wishes to perform abortions). *See* Under Advisement Ruling at 7.

The County Attorney's next argument (at 4-5) fares no better. Relying on the dissent in *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 151, (1973), the joinder focuses on particular as-applied situations. This rehashes ground that the Court is well aware was already covered at oral argument. That § 13-3603 would apply to prevent an abortion in the situations that the County Attorney identifies is highly speculative. But in any event, nothing prevents a plaintiff from bringing an as-applied challenge to § 13-3603, or a prosecutor from exercising discretion not to prosecute a particular case. But that is *not* a reason to maintain a total injunction based on a case that has been overruled.

The County Attorney's "fair notice" and "due process" arguments (at 5-6) similarly could be raised in a challenge to § 13-3603 but are misplaced in a request for stay of a Rule 60 motion. In fact, the County Attorney never acknowledges that such a challenge or request for declaratory relief could be brought *today*. The Attorney General has shown that the laws can be harmonized. *See, e.g.* pages 3-4 *supra*. But that is not the

proper scope of the current motion for stay. In sum, none of the County Attorney's arguments are proper bases to stay the narrow Rule 60 relief granted.

PPAZ also claims that the Attorney General cannot establish any injury to the State caused by a stay. But the Attorney General does not need to establish any injury caused by a stay of this Court's September 23 order; it is the "party seeking a stay on appeal" that must establish "irreparable harm if the stay is not granted." *Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 (2006). In any event, the harms to the State are irrefutable. It is well established that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Making the State's injury even greater in this case is that the statute was enjoined based on what the Supreme Court has now said was an "egregiously wrong" decision in *Roe*. *See Dobbs*, 142 S. Ct. at 2243 ("*Roe* was egregiously wrong from the start."). Staying the Court's order during the pendency of this appeal will continue to cause the State sovereign injury no different from that caused by the injunction that has now been set aside in the wake of *Dobbs*.

Importantly, the relevant time period for the possibility of irreparable harm and the balance of hardships for PPAZ's motion to stay is the time period for PPAZ to seek a stay from the Court of Appeals or to file a new action with a request for emergency relief. That time period is necessarily brief (a few weeks or less). Because abortion is permanent and results in the termination of an unborn life, PPAZ cannot show that the Under Advisement Ruling—which necessarily preserves the status quo—inflicts irreparable harm during the short period for PPAZ to seek an appellate stay or file a new action with a request for emergency relief. Neither PPAZ nor the County Attorney give *any* weight to the interests of the unborn, even though the Intervenor and Guardian ad Litem has laid out in detail the harms that will occur from abortions that occur in abortions at various weeks of gestation. *See* Hazelrigg Response to Motion to Stay.

The Court already concluded that this Rule 60(b) proceeding is not the proper avenue for Plaintiff to seek redress. *See, e.g.*, [Under Advisement Ruling at 7 ("The Court finds an attempt to reconcile fifty years of legislative activity procedurally improper in the context of the motion and record before it.")]. The Court noted that its "inquiry under Rule 60(b)(5) is narrow." [*Id.* at 6]. And the Court expressed that "Plaintiff may move to amend its Complaint . . . or may file a new action to seek relief it believes appropriate."[1] [*Id.* at 6]. Yet PPAZ has not done so. Instead, PPAZ asks this Court to reconsider what it has already deemed is not "procedurally or legally appropriate." [*Id.* at 7]. Thus, PPAZ's alleged harms do not constitute the irreparable harm required for a stay of this Court's order.[2] And given the irrefutable injury to the State, the balance of hardships does not tip (let alone sharply) in PPAZ's favor. PPAZ cannot show the irreparable injury or hardship sufficient to justify an open-ended stay pending appeal.

RESPECTFULLY SUBMITTED this 27th day of September, 2022.

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[1] Further, nothing stops Plaintiff or their patients from bringing an as-applied challenge to A.R.S. § 13-3603.

[2] No woman can be prosecuted for having an abortion in Arizona. And *Dobbs* strongly suggests that abortion providers should no longer be granted third-party standing to assert alleged harm to patients when challenging abortion laws. *See Dobbs*, 142 S. Ct. at 2275.

CERTIFICATE OF SERVICE

I certify that on September 27, 2022, the original of the foregoing was electronically filed with the Clerk of the Court for Pima County Superior Court via TurboCourt.

I certify that a copy of the foregoing was electronically delivered via TurboCourt to:

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